Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

KATHY ST. HILAIRE, Individually, and as Executrix for the Estate of Philip St. Hilaire,

Petitioner,

vs.

CITY OF LACONIA, Laconia, New Hampshire; TOWN OF BELMONT, Belmont, New Hampshire; COUNTY OF BELKNAP, Laconia, New Hampshire; DET. DAVID A. GUNTER, of the Laconia Police Department, in his individual and official capacity; SGT. BRIAN LOANES, of the Town of Belmont, in his individual and official capacity; SGT. DAVID NIELSEN, of the Town of Belmont, in his individual and official capacity; DEPUTY SHERIFF ROBERT DUPUIS, JR., of the Belknap County Sheriff's Department, in his individual and official capacity; DEPUTY SHERIFF DANIEL COLLIS, of the Belknap County Sheriff's Department, in his individual and official capacity,

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fourth Amendment jurisprudence of this Court requires that an unreasonable seizure claim directly resulting in the death of a human being be resolved pursuant to an objective reasonableness standard?

2. Whether it was firmly established under Fourth Amendment jurisprudence that plainclothes law enforcement agents must announce their identity and purpose before running upon a free citizen with weapons drawn?

3. Whether objectively unreasonable conduct in effecting a seizure in violation of well-established state and federal law principles can ever be subjected to a second-tier qualified immunity analysis to determine if police officers could have a good faith belief that their objectively unreasonable conduct was somehow reasonable?

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The opinion of the United States District Court for the District of New Hampshire is cited as *Kathy St. Hilaire, etc., Plaintiff v. City of Laconia, et al., Defendants,* 885 F. Supp. 349 (1995).

STATEMENT OF JURISDICTION

The petitioner seeks review from the judgment of the United States Court of Appeals for the First Circuit. The judgment was entered by the United States Court of Appeals for the First Circuit on December 1, 1995. (Appendix D). The petitioner then sought an enlargement of time in which to file a Petition for a Rehearing and Suggestion for a Rehearing En Banc. By order dated December 15, 1995, the time in which to request a rehearing was enlarged to and included December 29, 1995. (Appendix B). The petitioner timely filed a request for a rehearing. The panel of judges that rendered the decision voted to deny the Petition for Rehearing by order of the Court on January 5, 1996. (Appendix A).

This Court has jurisdiction pursuant to 28 U.S.C. § 1254 and 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment IV

AMENDMENT IV - SEARCH AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

28 U.S.C. § 1343

28 U.S.C § 1343(A)(3)(4)

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of an right privilege or immunity secured by the Constitution of the United States or by an Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable

or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

STATEMENT OF THE CASE

A tragic sequence of events during the effectuation of a seizure by law enforcement left Philip St. Hilaire dead from wounds inflicted by a police bullet.

A. The Shooting

In Laconia, New Hampshire on April 27, 1990, a four man team from the Belknap County Sheriff's office, the Laconia Police Department and the Belmont Police Department convened at the Belknap County Sheriff's office to prepare for the joint execution of a search warrant authorizing the search of Laconia Auto Wrecking and the "person" of Philip St. Hilaire. The team, joined by other police, then met at the premises known as Laconia Auto Wrecking in preparation for the execution of the warrant.

As Philip St. Hilaire sat in his car in the parking lot of Laconia Auto Wrecking looking forward with his radio on and his dog in the back seat, the officers approached him from behind. The police, who had been waiting behind the auto wrecking building, ran 125 feet toward St. Hilaire's car in single file with their weapons drawn, each separated by 10 to 15 feet. In a matter of seconds, Detective David Gunter of the Laconia Police Department, a stranger to Philip St. Hilaire, dressed in jeans and a t-shirt approached the passenger window pointing his .357 magnum. As St. Hilaire looked up and saw a stranger dressed in jeans and a t-shirt approaching his open passenger car window pointing a pistol at him, his eyes widened with fear. In that moment, it appeared to Detective Gunter that St. Hilaire

instinctively reached for a gun. Detective Gunter fired a bullet, hitting St. Hilaire in the neck. The bullet lodged in St. Hilaire's vertebrae, paralyzing him from the neck down. Sergeant David Nielsen of the Belmont Police Department, in full uniform, reached the driver side of the car next. As St. Hilaire lay paralyzed, he turned to the officer and said "Why didn't he identify himself? Why didn't he say he was a cop?" Later in the hospital emergency room, St. Hilaire repeatedly told his nurse "He didn't identify himself."

St. Hilaire died on October 19, 1991, as a result of complications from the injury he received from the police bullet. He was 40 years old.

B. Procedural History

Philip St. Hilaire's wife, Kathy St. Hilaire, as executrix for her husband's estate, filed suit in the United States District Court for the District of New Hampshire. She claimed that the defendants violated her husband's Fourth Amendment rights because the defendants engaged in objectively unreasonable conduct in executing a search warrant upon her husband. She claimed they failed to identify themselves as police officers and then shot her husband when he failed to yield. There is no dispute that a factual issue exists on the record as to whether law enforcement officers gave the decedent notice of their identity and purpose. The question remains whether that issue is one of "material" fact.

In the United States District Court for the District of New Hampshire, the defendants moved for summary judgment. In addressing that motion, the Court found that although "the officers contend that they shouted a series of orders to St. Hilaire with some variation of their account" (*see* Appendix E, p. 28a), the District Court assumed without deciding that the petitioner

"has produced enough factual support for her claim to raise a genuine factual dispute as to whether the defendants identified themselves as police officers when they approached St. Hilaire's vehicle." (*See* Appendix E, p. 38a).

The District Court entered summary judgment against the widow's action under 42 U.S.C. § 1983 finding that the officers were protected by qualified immunity. The District Court concluded that the officers' actions needed to be examined for "reasonableness" under the Fourth Amendment only at the moment of the shooting. In so doing, the District Court improperly applied prevailing constitutional jurisprudence.

Mrs. St. Hilaire appealed to the United States Court of Appeals for the First Circuit on the grounds that there were genuine disputes of material fact and that the officers abrogated clearly established constitutional rights. Her claim asserted that in effectuating a seizure on the run, in plain clothes with weapons drawn, the police were constitutionally required to effect the seizure in a reasonable manner. She claims the reasonableness inquiry includes adequate notice to her husband of the officers' identities and purpose.

In addressing the petitioner's claim, the First Circuit agreed ". . . that there is, on the record, a dispute of fact as to whether the police did identify themselves." (*See* Appendix D, p. 16a). The First Circuit went on to reject the District Court's analysis that the officers' actions need to be examined for reasonableness under the Fourth Amendment only at the moment of shooting. The court examined the actions of the police leading up to the seizure.

Nonetheless, the First Circuit opinion affirmed the grant of summary judgment on the ground ". . . that the factual dispute as to whether the defendant officers identified themselves as they

approached St. Hilaire is *immaterial* as a matter of law." (*See* Appendix D, p. 18a, emphasis added). Relying on this Court's decision in *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995), the Court held that it was not "clearly established in this Circuit as a constitutional requirement" (*see* Appendix D, p. 23a) that law enforcement provide adequate notice to an individual of their identity and purpose in effecting a seizure.

The petitioner submits this Petition for a Writ of Certiorari seeking to overturn the First Circuit's grant of summary judgment to the defendants. She asserts that summary judgment is inappropriate in this case. Both the District Court and the First Circuit have found a genuine issue regarding police identification. In the light viewed most favorable to the petitioner, this fact is material. Pursuant to Fourth Amendment jurisprudence, a genuine issue of material fact exists concerning police identification during a lethal seizure which must be addressed by a jury.

REASONS FOR GRANTING THE WRIT

I.

THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ERRED IN RESOLVING ISSUES OF SUMMARY JUDGMENT ON QUALIFIED IMMUNITY GROUNDS. THE DECISION FAILS TO FOLLOW EXPLICIT PRECEDENTS OF THIS COURT AS ANNOUNCED IN *GRAHAM V. CONNOR*, 490 U.S. 386 (1989) AND *TENNESSEE V. GARNER*, 470 U.S. 1 (1985). THE POLICE CONDUCT IN SURPRISING THE DECEDENT ON A DEAD RUN, IN PLAIN CLOTHES WITH WEAPONS DRAWN AND FAILING TO IDENTIFY THEMSELVES AS ANYTHING MORE THAN ORDINARY THUGS, WAS OBJECTIVELY UNREASONABLE AND THUS SUBJECT TO THE CONSTRAINTS OF THE FOURTH AMENDMENT.

The Fourth Amendment to the Constitution provides: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated. . ."

It necessarily follows that when evaluating police conduct in the execution of a deadly seizure, the Court must look to the reasonableness of that conduct. *Graham v. Connor, id.*

In this case, the petitioner asks the Court to determine whether police activity in conducting a secretive assault on the decedent in plain clothes, on a dead run and with weapons drawn, is constitutionally unreasonable.

In *St. Hilaire v. Laconia*, 71 F. 3d 20 (*see* Appendix D, p. 7a), the First Circuit's holding that the officers did not violate any constitutional requirement that was clearly established at the

time of the shooting incorrectly analyzed the petitioner's unreasonable seizure claim.

In affirming the district court's summary judgment ruling for the defendants, the First Circuit failed to conduct the requisite 'reasonable conduct analysis.' When granting the officers qualified immunity, the court mistakenly confined its analysis to whether officer identification prior to executing a search warrant was a constitutionally established principle. This law-specific reasoning does not embrace the proper analysis. Pursuant to the constitutional mandate of the Fourth Amendment, the analysis must include an inquiry as to the objective reasonableness of police conduct.

Graham establishes that an unreasonable seizure claim must be evaluated on an objectively reasonable basis. The analysis has consistently focused on the reasonableness of police activity in conducting a seizure irrespective of a specific constitutionally established principle. The principles embedded in the Fourth Amendment requires this objective evaluation.

By narrowly searching for a law-specific constitutionally established principle, the court in *St. Hilaire* undermined the significance of the Fourth Amendment's reasonableness requirement. The reasonableness of the manner in which a seizure is effected is always the inquiry. *Tennessee v. Garner, supra,* at 13; *United States v. Watson,* 423 U.S. 411 (1975); *Gerstein v. Pugh,* 420 U.S. 103 (1975); *Carroll v. United States,* 267 U.S. 132 (1925).

The requirement of reasonable activity in conducting a seizure has traditionally been a fundamental consideration in determining the scope of rights protected by the Fourth Amendment, as ". . . the underlying command of the Fourth Amendment is always that searches and seizures be reasonable," *New Jersey v. T.L.O.,* 469 U.S. 325, 337 (1985).

Moreover, it is well settled law that when evaluating an unreasonable seizure claim, the analysis focuses on all of the circumstances of the particular case, rather than on any one particular factor. The Fourth Amendment acts as a shield against objectively unreasonable police action, protecting the public from police "misuse of power." *Byars v. United States*, 273 U.S. 28 (1927). Thus, Fourth Amendment analysis requires an inquiry into all of the circumstances of police activity in conducting seizures. The analysis does not, contrary to the First Circuit's approach, call for a search for a "clearly established right" that the police identify themselves.

Today the reasonableness inquiry focuses on the totality of circumstances. *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989), held that, "Once it has been established that a seizure has occurred, the Court should examine the actions of the government officials *leading up to* that seizure." (Emphasis added). *Inyo* precludes an inquiry into the subjective intent of the officers. Rather Fourth Amendment reasonableness requires an objective analysis. Pursuant to *Graham v. Connor*, 490 U.S. 386, 397 (1989), the Fourth Amendment reasonableness standard asks, "... whether the officers actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Relying on *Graham*, the correct Fourth Amendment unreasonable seizure inquiry must include an objective analysis of the following: (1) the manner in which the officers conducted their search; (2) the method of conducting their seizure; (3) the preceding circumstances leading to use of deadly force, including lack of identification as state officials; (4) the decedent's prior cooperative encounters with law enforcement agents; (5) the potential risk of flight by decedent; (6) the severity of the crime; (7) the lack of an immediate threat to officers or others.

In *St. Hilaire,* the petitioner asserted that the method of police conduct in carrying out their lethal seizure was objectively unreasonable. Accordingly, the Court in this case should evaluate police actions both prior to and during the effectuation of a search warrant and their ensuing use of deadly force. In rejecting the district court ruling that the police officers' actions need to be examined only at the moment of the shooting, the First Circuit properly relied upon the mandate set forth in *Inyo.* However, in its next level of analysis, the court too narrowly defined the issue as one of simply searching for a law-specific constitutionally established principle. The next level should involve a consideration of the objective reasonableness of the defendants' actions as a whole.

In *Terry v. Ohio,* 392 U.S. 1, 28 (1968), the Court found that " the manner in which the [search] . . . [was] conducted is, of course, as vital a part of the inquiry as whether [it was] warranted at all." Unlike the reasoning of the First Circuit, the proper analysis includes a determination of the objective reasonableness of police activity. It is plain that the reasonableness "of a particular seizure depends not only on when it is made, but on also how it is carried out." *Graham v. Connor,* 490 U.S. 386, 389 citing *Tennessee v. Garner,* 471 U.S. 1, 7-8 (1985). Thus, prior holdings of this Court stand for the proposition that the reasonableness of the manner in which a seizure is executed is always at issue in a Fourth Amendment scenario. *Garner, Graham* and *Inyo* make plain that the reasonableness command of the Fourth Amendment controls the conduct of police in the manner in which a seizure is effected.

Justice Jackson's warning in *McDonald v. United States,* 335 U.S. 451 (1948) went unheeded in this case and a human life has been lost. There, the Court examined the Fourth Amendment requirement for a warrant and evidence seized at a bookie's apartment. In police's haste to uncover evidence of the bookie's

activities, plain clothes police officers gained entry to the premises by prying open the bedroom window of a woman in the apartment complex. In assessing the conduct of the police in that case Justice Jackson, concurring, said:

> I am the less reluctant to reach this conclusion because the method of enforcing the law exemplified by this search is one that is certain to involve the police in grave troubles if continued . . . when a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot. A plea of justifiable homicide might result awkwardly for enforcement officers. But an officer seeing a gun drawn on him might shoot first. Under the circumstances of this case, I should not want the task of convincing the jury that it was not murder. I have no reluctance in condemning as unconstitutional a method of law enforcement so reckless and so fraught with danger and discredit to law enforcement agencies themselves.

Id. at 461.

Here, the decedent St. Hilaire turned to his right only to be surprised by an unidentified man wearing a t-shirt and jeans, pointing a .357 magnum at him. In that moment, the police shot first. In the haste of the police to uncover suspected drugs, their conduct not only endangered the life of the suspect — it killed the suspect.

Philip St. Hilaire had a constitutionally protected right to be free from unreasonable searches and seizures. The petitioner

says that Detective Gunter, absent any notice, and in surprising St. Hilaire on a dead run, in plain clothes with his weapon drawn, blatantly disregarded the decedent's Fourth Amendment rights.

It follows that the United States Court of Appeals for the First Circuit erred in confining its analysis to the discovery of a specific constitutionally established principle solely concerning officer identification. It is well-established that law enforcement officers need to conduct themselves reasonably in making a seizure. The petitioner has put forth sufficient evidence for a jury to conclude that law enforcement engaged in objectively unreasonable conduct in seizing Philip St. Hilaire. If affirmed, the reasoning of the First Circuit necessarily eliminates any inquiry into the reasonableness of the police officers' conduct. This case is controlled by *Connor* and its explicit command:

> Today we make explicit what was implicit in *Garner's* analysis, and hold that *all* claims that law enforcement officers have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other seizure of a free citizen should be analyzed under the Fourth Amendment and its reasonableness standard. . . .

Graham v. Connor, 490 U.S. 386, 395.

II.

THE FIRST CIRCUIT COURT OF APPEALS ERRED IN APPLYING QUALIFIED IMMUNITY TO AN EXCESSIVE FORCE CASE IN HOLDING THAT LAW ENFORCEMENT'S FAILURE TO IDENTIFY ITSELF WHILE APPROACHING THE DECEDENT IN PLAIN CLOTHES WITH WEAPONS DRAWN WAS IMMATERIAL AS A MATTER OF LAW.

A. The So-Called "Knock-and-Announce" Rule.

In its holding, the First Circuit correctly found sufficient evidence supporting the petitioner's claim that law enforcement officers did not provide adequate notice as to their identity and lawful purpose when storming the decedent in plain clothes, with weapons drawn. However, after concluding that the officers did not identify themselves or their purpose in carrying out their deadly assault on Philip St. Hilaire, the court incorrectly concluded that this factual dispute was immaterial as a matter of law.

Today, the federal government and at least forty-one states require announcement prior to arrest and search either by statute, common law, or under the reasonableness requirement of the Fourth Amendment. Many of these statutes are known as knock-and-announce laws designed to protect the sanctity of the home. The general requirement of announcement shines through each scenario.

The general requirement of announcement has always been an integral part of Anglo-American law, applying to all searches, seizures and arrests. This requirement is designed to preserve respect for the privacy of persons and promote protection. The common law policies underlying knock-and-announce rules

apply to the innocent and guilty alike. *Weeks v. United States*, 232 U.S. 383 (1914). The history of knock-and-announce jurisprudence innately includes protection against violence by startled citizens or nervous police officers waving guns during a highly charged situation that invites the use of deadly force.

In 1917 Congress adopted 18 U.S.C. § 3109, a federal knock-and-announce statute based on a New York statute from 1782. In *Miller v. United States*, 357 U.S. 301 (1958), the Court held that the statute was but a codification of the common law rule requiring officer identification.

The Model Penal Code (MPC) further demonstrates this announcement requirement. MPC § 3.07(2) *Limitations on the Use of Force* states:

> (a) The use of force is not justified under this Section unless:
>
> > (i) the actor makes known the purpose of the arrest or believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested.

The requirement of reasonable notice of the officer's presence, identity, and purpose has traditionally been a fundamental consideration in determining the scope of rights protected by the Fourth Amendment. The courts have always recognized the principle that before a search or seizure is made "notice must be provided," *Semayne's Case*, 5 Co. Rep. 91, 77 Eng. 194 (K.B. 1603). The law has always braced the basic concept that the authorities executing a search take adequate steps to insure "that the party hath notice, that the officer cometh not as a mere trespasser, but claiming to act under proper

authority," *Lee v. Gansell*, Lofft 374, 382-383, 98 Eng. Rep. 700, 705 (K. B. 1774).

In *Sabbath v. United States*, 391 U.S. 585 (1968), the Court found that police failure first to announce their identity and purpose before entering the petitioner's apartment was unlawful. Although *Sabbath* relied on 18 U.S.C. § 3109 (the federal knock-and-announce statute) the Court reasoned that the execution of a search warrant must be governed by more than "the fortuitous circumstance of an unlocked door." *See also Ker v. California*, 374 U.S. 23 (1963), where the court found that ". . . an intrusion, it is true, can be made in a way so violative of the privacy and property rights of the occupants of a dwelling as to be *unreasonable* within the meaning of the Fourth Amendment." (Emphasis added).

As discussed *infra*, Justice Jackson, concurring in *McDonald v. United States*, 335 U.S. 451, 461 (1948), noted the great risk of unannounced police activity. His ominous warning in that case echoes the Fourth Amendment's command that law enforcement officers identify themselves and their purpose when making a seizure of a free citizen.

As stated in *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995), "the knock-and-announce rule is so fundamental to our constitutional system that it must be considered a part of the reasonableness clause of the Fourth Amendment." Although the holding in *Wilson* was not effective in 1990, its summation of prior existing judicial opinions is instructive.

In *Miller v. United States*, the common law background to § 3109 was extensively examined and the Court concluded;

> The requirement of prior notice of authority and purpose before forcing entry into a home

> is deeply rooted in our heritage and should not be given grudging application. Congress, codifying a tradition embedded in Anglo-American law, had declared in § 3109 the reverence of the law for the individual's right of privacy in his house.

Id. at 313.

The petitioner asserts that, like the knock-and-announce rule, objectively reasonable notice of the officer's identity and purpose is a necessary part of the Fourth Amendment. She submits that law enforcement activity in this case ran afoul of the objective reasonableness required when making a seizure.

B. Excessive Force

The seminal case on Fourth Amendment excessive force scenarios is *Tennessee v. Garner,* 471 U.S. 1 (1985), establishing that "[a]pprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Id.* at 6.

Tennessee v. Garner explains the notice requirement of the Fourth Amendment in excessive force cases. In *Garner,* the Court held that:

> . . . [t]he intrusiveness of a seizure by means of deadly force is unmatched. . . . The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that the mechanism will not be set in motion. Where the officer has probable cause to believe that the suspect

> poses a threat of serious physical harm, either to the officers or others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon, deadly force may be used if necessary to prevent escape and where feasible, *some warning has been given.*

Id. 471 U.S. at 9. (Emphasis added).

It equally is well established under New Hampshire state law that in executing a warrant, the police are required to announce their lawful purpose and identity. Although holding that violation of the knock-and-announce statute was not violative of the New Hampshire constitution, the New Hampshire Supreme Court in *State v. Jones*, 127 N.H.515 (1985) held:

> . . . that New Hampshire police officers, before forcibly entering a dwelling, should knock, identify themselves and their purpose.

Id. at 518.

Furthermore, specifically in physical force scenarios, the State of New Hampshire makes clear the burden of identification placed on law enforcement agents. New Hampshire Revised Statutes Annotated, 627:5, II(b) (2), Physical Force in Law Enforcement, requires in pertinent part that before exerting permissible deadly force, the officer must have ". . . made reasonable efforts to advise the person that he is a law enforcement officer attempting to effect an arrest . . ." Here, again, the state-specific law proscribes the actions taken in this case.

Thus, the specific inquiry is not whether the "knock and announce rule" as announced by *Wilson v. Arkansas* was clearly established in 1990. Rather, the appropriate inquiry is whether the police officers' conduct in failing adequately to identify themselves could be viewed as reasonable when those police officers were aware or should have been aware of such firmly entrenched notice provisions of both New Hampshire Supreme Court, the laws of the State of New Hampshire and the laws of the land.

In this case, the officers failed to provide Philip St. Hilaire with notice of their presence, identity, or intentions; all required by Fourth Amendment jurisprudence. Relying on *Garner,* such warning was clearly feasible as the officers had complete control of the events.

Philip St. Hilaire was unaware of the police presence. He was not attempting to resist arrest. He posed no immediate threat to the officers' or others (*see* Appendix D, p. 20) and he was not in the act of committing any further criminal acts. He was simply seated in his car. Acting upon their warrant of his "person," the police were in a position easily to afford St. Hilaire adequate notice of their presence, identity, and purpose as required by firmly established principles. The available methods for providing notice were plentiful. They included: audibly announcing their presence with an amplifier; warning St. Hilaire by sounding their sirens; insuring that a uniformed officer be the first to approach his car; or choosing any other effective method of providing notice. The police methods used in seizing the decedent unreasonably violated his constitutional rights. Without providing any notice and effectively concealing their identities in street clothes, the officers in this case acted contrary to clearly established principles in an objectively unreasonable fashion.

No officer under similar circumstances could reasonably believe that plainclothes police, brandishing guns, could ambush a citizen without creating an unreasonable risk to both the officer and citizen they were seizing.

In this case, the startled decedent, fearing for his life, mistakenly viewed the police mere assailants, and sought protection. His reflexive response to guns being drawn at close range by unidentified men exemplifies the unreasonable manner in which this seizure occurred. The Fourth Amendment places the burden of reasonableness on those actions taken by the seizing authority. In *St. Hilaire,* official neglect of this requirement resulted in death.

III.

THE APPLICATION OF "QUALIFIED IMMUNITY" TO EXCESSIVE FORCE CASES WHERE THE OBJECTIVE REASONABLENESS OF THE CONDUCT OF LAW ENFORCEMENT OFFICERS IN EITHER EFFECTING AN ARREST OR EFFECTING A SEIZURE HAS RESULTED IN CONFUSING AND CONFLICTING RESULTS.

The current law regarding qualified immunity is set out in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). There this Court stated that:

> government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818.

Implicit in this ruling is the notion that when state actions violate clearly established law, a claim of immunity should fail. Qualified immunity protects government officials "as long as their actions could reasonably have been thought consistent with the rights that they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635 (1987). According to *Harlow*, ". . . the inquiry turns on the objective legal reasonableness of the action . . . and assessed in the light of the legal rules that were clearly established at the time it was taken." *Id.* at 818-819.

However, *Graham v. Connor, supra*, makes clear that the appropriate inquiry when assessing law enforcement's conduct in light of the Fourth Amendment's mandate of reasonableness is simply whether the conduct was objectively reasonable or whether it was not. A resolution of that question necessarily resolves any qualified immunity claim that law enforcement may have. This is so because it is conceptually incoherent to make a factual determination that a police officer's conduct was objectively unreasonable as a matter of law and then somehow determine that he could have believed his conduct to be reasonable.

This case readily illustrates the difficulty of applying a qualified immunity test to cases in which the unreasonable conduct of the police is assessed. The District Court granted summary judgment to the defendants on the basis of qualified immunity holding that:

> the law concerning whether a police officer who legitimately uses deadly force in self-defense nevertheless violates the Fourth Amendment by unreasonably increasing the likelihood that deadly force will become necessary was not clearly established when the defendants acted. See *Sullivan v. Horta*, 4 F.3d 2, 13 (1st Cir., 1993). Accordingly, the

> defendants are entitled to prevail on their qualified immunity defense.

(*See* Appendix E, pp. 40a-41a). That analysis by-passed an inquiry into whether the conduct of the police officers in surprising the decedent was objectively unreasonable.

Eschewing in part the District Court's analysis, the First Circuit viewed the intentional conduct of the police in approaching St. Hilaire in the manner that they did was a seizure within the meaning of the Fourth Amendment. *See Brower v. Inyo, supra.* Nevertheless, the Court invoked the doctrine of qualified immunity, holding that the manner in which the police officers conducted the seizure was immaterial as a matter of law. Relying heavily on *Wilson v. Arkansas, supra,* the First Circuit determined that it was not clearly established as a constitutional principle that police officers identify themselves in effecting a seizure. The result is that objectively unreasonable conduct is somehow protected by the doctrine of qualified immunity.

The petitioner submits that the appropriate inquiry in determining whether qualified immunity in this case is available is precisely the same inquiry in determining whether the officers' conduct is objectively reasonable under the Fourth Amendment. Logically speaking, either an officer's conduct is objectively reasonable or it is not. If it is not, it then follows that objectively unreasonable behavior violates the Fourth Amendment. This is irrespective of any subjective belief that the officer may have that his conduct is reasonable. This is precisely what *Graham v. Connor,* intends to do — that is, eliminate any inquiry into the subjective intent of police officers in effecting a seizure.

Nevertheless, the various Circuits have addressed the issue of qualified immunity in an inconsistent manner. In *Finnegan v. Fountain,* 915 F.2d 817 (2d Cir., 1990), the court held that a

qualified immunity defense is generally available in excessive force claims. However, the court acknowledged the conflict on the availability of that defense:

> We take this opportunity to consider an issue decided by the District Court and almost certain to appear again on retrial: Whether qualified immunity is generally available as a matter of law as a defense against the claim of excessive force by a law enforcement officer in effecting an arrest. While one Federal Court of Appeals has concluded that it is not, see *Holt v. Artist*, 843 F. 2d 242, 243, 246 (6th Cir., 1988) others have concluded that the defense is available. See *Brown v. Glossip*, 878 F. 2d 871, 873-74 (5th Cir., 1989); *Thorsted v. Kelly*, 858 F. 2d 571, 573 (9th Cir., 1988). The Supreme Court meanwhile has expressly reserved judgment on this issue.

Id. at 822. *Accord, see Harper v. Harris County Texas*, 21 F.3d 597 (5th Cir. 1994).

In contrast, the Seventh Circuit has determined that all excessive force claims stemming from an arrest or other seizure by police are analyzed under a Fourth Amendment "objective reasonableness standard." *Ellis v. Wynalda*, 999 F. 2d 243 (7th Cir., 1993). The court equated qualified immunity with an inquiry into the objective reasonableness of the police officer's conduct. In an unpublished opinion, *Street v. Parham*, 929 F. 2d 537 (1991), the Tenth Circuit held that it was error to instruct a jury on a qualified immunity defense after the jury had already answered a special request for instruction indicating that it found that the conduct of the police officers was unreasonable.

In *Brandenburg v. Cureton*, 882 F.2d 211 (6th Cir. 1989), the court examined a case where the plaintiff alleged that the defendant shot and killed the plaintiff/decedent without just cause. The defendant alleged that he shot and killed the decedent only after he had pointed a shotgun at him and his fellow officers. In examining the immunity question, the court held;

> In this case, however, the jury becomes the final arbiter of appellant Sharp's claim of immunity, since the legal question of immunity is completely dependent upon which view of the facts is accepted by the jury. If the jury determines that Sharp fired on Brandenburg without belief that someone was in danger of serious bodily injury, then as a legal matter, no reasonable officer could believe that such gunfire would not violate another's constitutional rights. On the other hand, if the jury believes Detective Sharp's version of the facts, he will be entitled to qualified immunity.

Id. at 216. *See also Dixon v. Richer*, 922 F.2d 4 (10th Cir. 1991) (holding that a qualified immunity defense is no difference than a substantive objective reasonableness inquiry under the Fourth Amendment).

Based on the foregoing, it is submitted that the acceptance of this Petition for Writ of Certiorari will resolve the conflict generated by the application of qualified immunity principles in those cases in which the objective reasonableness of the police is called into question.

CONCLUSION

Wherefore, the petitioner requests that this Court grant the following relief:

A. Accept this Petition for Writ of Certiorari;

B. Reverse the judgment of the Circuit Court of Appeals for the First Circuit;

C. Remand for trial on the merits;

D. For such further relief as may be just.

Dated: April 4, 1996

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED JANUARY 5, 1996

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1463

KATHY ST. HILAIRE, ET AL.,

Plaintiff, Appellant

v.

CITY OF LOCONIA, ET AL.,

Defendants, Appellee

Before

Torruella, *Chief Judge*
Aldrich and Campbell, *Senior Judges*
Selya, Cyr, Boudin, Stahl
and Lynch, *Circuit Judges*

ORDER OF THE COURT

Entered: January 5, 1996

The panel of judges that rended the decision in this case having voted to deny the petition for rehearing and the suggestions for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

Appendix A

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By The Court

JANICE M. O'NEIL
Acting Clerk

[cc: Messrs. Bownes, O'Neil, Perrault and Beyer]

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED DECEMBER 15, 1995

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1463

KATHY ST. HILAIRE, ETC.

Plaintiff - Appellant

v.

CITY OF LACONIA, ET AL.,

Defendants - Appellees

ORDER OF COURT

Entered: December 15, 1995

Upon consideration of motion,

It is ordered that the time for filing a petition for rehearing and suggestion for a rehearing en banc be, and the same hereby is enlarged to and including December 29, 1995.

By the Court:

Francis P. Scigliano, Clerk

By JANICE M. O'NEIL
Chief Deputy Clerk

Appendix B

cc: David H. Bownes, Esq.
A. Gerard O'Neil, Esq.
Wayne C. Beyer, Esq.
Donald J. Perrault, Esq.
Christine Desmarais-Gordon, Esq.

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED DECEMBER 1, 1995

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1463

KATHY ST. HILAIRE, ETC.,

Plaintiff, Appellant,

v.

CITY OF LACONIA, ET AL.,

Defendants, Appellees.

JUDGMENT

Entered: December 1, 1995

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: Judgment of the district court is affirmed.

No costs are awarded.

Appendix C

By The Court
FRANCIS P. SCILIANO
Clerk.

[cc: Messrs. Bownes, Beyer and Perrault]

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED DECEMBER 1, 1995

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1463

KATHY ST. HILAIRE, ETC.

Plaintiff, Appellant,

v.

CITY OF LACONIA, ET AL.

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Paul J. Barbadoro, *U.S. District Judge*]

Before

Lynch, *Circuit Judge*,

Aldrich and Campbell, *Senior Circuit Judges*.

David H. Bownes, with whom *A. G. O'Neil, Jr.* and *Normandin, Cheney & O'Neil* were on brief, for appellant.

Wayne C. Beyer with whom *Wayne C. Beyer and Associates, P.C.* was on brief, for appellees City of Laconia, Town of Belmont, David A. Gunter, David Nielsen, and Brian Loanes.

Appendix D

Donald J. Perrault, with whom *Christine Desmarais-Gordon* and *Wadleigh, Starr, Peters, Dunn & Chiesa* were on brief, for appellees County of Belknap, Robert Dupuis, Jr., and Daniel Collis.

December 1, 1995

LYNCH, Circuit *Judge*. A tragic sequence of events leaving Philip St. Hilaire dead from wounds from a police bullet and leaving law enforcement officers and their municipal employers sued by his widow brings this case before us. The district court entered summary judgment against the widow's action under 42 U.S.C. § 1983, finding that the officers were protected by qualified immunity. Mrs. St. Hilaire appeals, saying there are genuine disputes of material fact and that the officers abrogated clearly established constitutional rights. We hold that while there are disputes of fact, those disputes are not material. We affirm because the defendants are entitled to qualified immunity in that they did not violate any constitutional law that was clearly established at the time of the shooting and they could reasonably have believed their search warrant was supported by probable cause.

FACTS

Armed with some evidence (the sufficiency of which plaintiff challenges), Deputy Robert Dupuis of the Belknap County Sheriff's Office applied for a search warrant from the local district court to search both the person of Philip St. Hilaire and his place of business, Laconia Auto Wrecking. Based on information from a confidential informant, the police believed St. Hilaire was selling cocaine at Laconia Auto Wrecking and that he had just travelled to New York to "score" a load of

cocaine. The warrant issued and the police planned their operation to execute the search warrant.

It was a joint operation between the Belknap Sheriff's Office, the Belknap Police and the Laconia Police. The participants — defendants Deputy Dupuis, Deputy Daniel Collis, Sgt. David Nielsen, Sgt. Brian Loanes, and Detective David Gunter — met in the early evening of April 27, 1990. The police believed St. Hilaire to be armed and possibly dangerous. They knew that St. Hilaire carried a .357 caliber revolver or a .25 caliber semi-automatic pistol, or both, and that he had a shotgun and a crossbow on the premises. They also had information that St. Hilaire had, a few days earlier, pointed a gun at the head of a person who had stooped to pick up St. Hilaire's dropped money bag. The police had also received complaints some time earlier about the sounds of shooting from the auto yard.

The police were concerned about the reflective glass on the front of Laconia Auto Wrecking, which made it difficult for people outside to see in but easy for people inside to see out. They felt it would be a danger to the police to approach the front of the building abruptly.

They decided that Deputy Dupuis and Sergeants Nielsen and Loanes would execute the search warrant. Detective Gunter, stationed across the street to help with surveillance, would then come in with his drug dog, Lux. Deputy Sheriff Collis was also stationed across the street, monitoring the auto yard, in radio communication with Dupuis. Sergeant Nielsen was in uniform; the remaining four defendant officers were in plain clothes. The search team waited at the rear of the building Patrolmen in two marked cruisers were stationed on the road on either side of the business.

Appendix D

The plan was as follows. The team, led by Sgt. Nielsen would enter the building and then search St. Hilaire and the building. If the building was closed, the officers would find a way to enter or would wait for St. Hilaire to emerge and then reach him outside. They planned to identify themselves as law enforcement officers and state their purpose. Sergeant Nielsen was to lead because he was in uniform and St. Hilaire knew him from prior encounters. The officers thought this would be the safest way to proceed. Detective Gunter testified that, in execution of a search warrant, the best policy is to make sure the subject understands that he is dealing with a police officer.

Things did not go according to plan. After watching someone else unsuccessfully trying to get in to the building, Collis concluded that the front door was likely locked and radioed so to Dupuis. Dupuis decided on more manpower and called Detective Gunter over to join the team waiting behind the building. Collis then saw St. Hilaire leave the building with his dog, lock up, and walk toward his car in the parking lot. Collis radioed this information to Dupuis.

The team, waiting behind the auto-wrecking building, decided to move in. Detective Gunter, who was closest to the parking lot, ran in front, ahead of the others. The police rounded the corner of the building and travelled the roughly 125 feet to the car in a period of seconds, hoping to reach St. Hilaire before he got into his car. It was not to be. St. Hilaire had already put his dog in the back seat, gotten into the driver's seat of his car and turned on the engine. Detective Gunter, who was dressed in jeans and a t-shirt, ran up to the car.

St. Hilaire, at that moment, looked up and saw a stranger dressed in jeans and a t-shirt, approach his open car passenger

window, pointing a .357 magnum revolver toward him. St. Hilaire's eyes widened. St. Hilaire reached for his own gun, or so it appeared to Detective Gunter. Detective Gunter fired a bullet, hitting St. Hilaire in the neck. The bullet lodged in St. Hilaire's vertebra, paralyzing him from the neck down.

Sergeant Nielsen, in uniform, reached the car next. He saw that St. Hilaire's right hand was on top of a gun on the car seat. Sergeant Nielsen told St. Hilaire to let go of the gun. St. Hilaire replied that he could not, that he could not move. The police removed the gun.

St. Hilaire said to Sgt. Nielsen, "I didn't know you guys were the cops. Why didn't he identify himself? Why didn't he say he was a cop?" Later, at the hospital emergency room, St. Hilaire repeatedly told his nurse, "He didn't identify himself." St. Hilaire made the same statements to his wife.

The police testified, at deposition, that they did identify themselves. Detective Gunter testified that when he was halfway to the car he yelled, "Phil, police, Phil" and then, at the side of the car, he yelled "Hold it." He also testified, "I'm sure I yelled 'police,' but I don't remember." Sergeant Nielsen said that he heard Detective Gunter say, "Hold it Phil, police. Hold it, police," as Detective Gunter was about a foot away from the passenger side of the car. Deputy Dupuis said he was just behind Detective Gunter and heard Detective Gunter yell "Phil, police." Deputy Dupuis said he also yelled, "Police" as he rounded the building, some 58 feet from the car. Sergeant Loanes said he heard someone say something like "Police, freeze." Two other officers, who had been stationed across the street, heard someone yell, "Police." One of them, Collis, heard "Police" within two

seconds of the gunshot. A passing motorist heard "Freeze," just before seeing the flash of a gun. Detective Gunter also said he had his police badge held in his extended left hand as he approached the car. Dupuis saw the badge in Detective Gunter's left hand immediately after the shooting.

Some currency and a bag containing three-fourths of an ounce of cocaine, worth about $2,200, were recovered from St. Hilaire's jacket. St. Hilaire died in October 1991 as a result of complications from his injuries. He was forty years old.

LEGAL CLAIMS

Kathy St. Hilaire brought suit individually and as executrix of the estate under 42 U.S.C. § 1983 asserting that defendants had violated the Fourth Amendment. She also brought pendent state law claims for negligence and negligent and intentional infliction of emotional distress. Plaintiff's Fourth Amendment theories were that the search warrant was obtained without probable cause and that the defendants "used unreasonable force in executing a search warrant upon her husband in that they failed to identify themselves as police officers and then shot her husband when he failed to yield."

The district court entered summary judgment based on qualified immunity. That decision is reviewed *de novo*. *Hegarty v. Somerset County*, 53 F.3d 1367, 1372 (1st Cir. 1995) (citing *Jirau-Bernal v. Agrait*, 37 F.3d 1, 3 (1st Cir. 1994)), *petition for cert. filed* (U.S. Oct. 17, 1995) (No. 95-629). All facts are reviewed in the light most favorable to the party opposing summary judgment. *Id.*

Appendix D

The ultimate question of qualified immunity should ordinarily be decided by the court.[1] *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). In determining whether there is a qualified immunity defense "the court should ask whether the agents acted reasonably under settled law in the circumstances." *Id.* This court has identified two prongs to the basic qualified immunity analysis. *Hegarty*, 53 F.3d at 1373 (quoting *Burns v. Loranger*, 907 F.2d 233, 235-36 (1st Cir. 1990)). First, the court must establish whether the constitutional right asserted by the plaintiff was "clearly established" at the time of the alleged violation. *Id.* Second, the court must ask whether "a reasonable

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1. While this court has not had the occasion to explore fully the allocation of functions between judge and jury where facts relevant to the immunity defense are in dispute, we have said that "we doubt the Supreme Court intended this dispute to be resolved from the bench by fiat." *Prokey v. Watkins*, 942 F.2d 67, 72 (1st Cir. 1991). The ultimate question of whether a reasonable police officer, on the basis of information known to him, could have believed his actions were in accord with constitutional rights is "a question of law, subject to resolution by the judge not the jury." *Id.* at 73. But if there is a factual dispute, "that factual dispute must be resolved by a fact finder." *Id.* The precise question of whether the judge may intercede and play that fact finder role appears not to have been clearly decided by the Supreme Court. Some courts, consonant with the Seventh Amendment, have preserved the fact finding function of the jury through special interrogatories to the jury as to the disputes of fact, reserving the ultimate law question to the judge. *See King v. Macri*, 993 F.2d 294, 299 (2d Cir. 1993); *Warren v. Dwyer*, 906 F.2d 70, 76 (2d Cir.), *cert. denied*, 498 U.S. 967 (1990); *Lubcke v. Boise City/Ada Cty. Housing Auth.*, 124 Idaho 450, 860 P.2d 653, 667 (1993); *see also Oliveira v. Mayer*, 23 F.3d 642, 649 (2d Cir. 1994) (when material facts were disputed, issue of qualified immunity was for the jury), *cert. denied*, 115 S. Ct. 721 (1995); *Karnes v. Skrutski*, 62 F.3d 485, 491 (3d Cir. 1995) (same); *Presley v. City of Benbrook*, 4 F.3d 405, 410 (5th Cir. 1993) (if there remain disputed issues of material fact, jury, properly instructed, may decide issue of qualified immunity); *Brandenburg v. Cureton*, 882 F.2d 211, 216 (6th Cir. 1989) (jury is final arbiter of qualified immunity when issue depends upon which version of the facts the jury finds).

official situated in the same circumstances should have understood that the challenged conduct violated that established right." *Id.* (quoting *Burns*, 907 F.2d at 236).

Whether the rights alleged are "clearly established" is a question of law for the court. *Elder v. Holloway*, 114 S. Ct. 1019, 1023 (1994). For purposes of determining qualified immunity, the officer's actions are measured by a standard of "objective legal reasonableness . . . in light of the legal rules that were clearly established at the time [they] were taken."[2] *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (internal quotation omitted).

The Supreme Court, recognizing that the use of summary judgment in qualified immunity cases could be undermined, has held that a very broad articulation of the "clearly" established law at the time of the alleged violation is inappropriate:

> [T]he right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

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2. This court has noted that, at least in police misconduct cases, the objective reasonableness standard for liability is most likely the same as that for a qualified immunity defense. *Roy v. Inhabitants of the City of Lewiston*, 42 F.3d 691, 694 (1st Cir. 1994). But see Oliveira, 23 F.3d at 648-49 (maintaining that the two standards are distinct). In any event, we draw on the cases decided in the liability context for guidance in deciding the qualified immunity question. *See, e.g., Graham v. Connor*, 490 U.S. 386, 397 (1989).

Anderson, 483 U.S. at 640. Without such a rule, the Court said, "[a] passably clever plaintiff would always be able to identify an abstract clearly established right that the defendant could be alleged to have violated," *id.* at 640 n.2, and so defeat summary judgment.[3]

The Court has also warned against requiring too great a specificity in the "clearly established law" such that the officer would be granted qualified immunity "unless the very action in question ha[d] previously been held unlawful." *Anderson*, 483 U.S. at 640. An earlier warning against exactly such a misapplication of the qualified immunity doctrine was given in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), a warning cited in *Anderson*. In *Mitchell* the court noted:

> We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances.

472 U.S. at 535 n.12. The proper characterization of the "clearly established law" is implicated in this case.

The Shooting

Plaintiff asserts two Fourth Amendment theories as to the

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3. Similarly, we note, a "passably clever" defendant might characterize the right involved in such broad terms as to say such a broad articulation could not permit a reasonable official to understand that what he is doing violates that right and so the right was not "clearly established."

shooting, both independent of her Fourth Amendment claim as to the warrant. Plaintiff argus that "[n]o reasonable law enforcement agent could believe that in executing a search warrant the law allowed him to surprise a suspect on a dead run, in plain clothes, with gun drawn at close range, and not provide that individual with adecuate and reasonable notice of his identity and his lawful purpose." Plaintiff also argues that the facts of record "are sufficient to raise a material and genuine issue as to whether [Detective] Gunter had a reasonable belief he was acting in self defense." She claims that the "resolution of these issues is an inherently fact-based matter for the jury as no other officers observed the alleged conduct of St. Hilaire in reaching for the weapon." The latter claim is, we believe, without merit. The first claim, that the police were required to identify themselves and their lawful purpose, however, raises difficult issues.

Plaintiff argues that summary judgment was improper because there were material facts in dispute. We agree that there is, on the record, a dispute of fact as to whether the police did identify themselves. St. Hilaire's first words, as he sat with a bullet hole in his neck, were to ask why the police had not identified themselves. He repeated this question at the hospital and told his nurses and his wife that the police did not identify themselves. While an inference can be drawn from the deposition testimony of the officers that St. Hilaire simply did not hear the identifications given by the police, another plausible inference could be drawn that the police did not identify themselves. A passing motorist who heard the police say "freeze" did not hear the word "police" mentioned, although the police testimony is that the two words were uttered together. Where "inferences to be drawn from the web of facts are disputed and unclear — and are likely to depend on credibility judgments," there is a dispute of fact. *Prokey v. Watkins*, 942 F.2d 67, 73 (lst Cir. 1991).

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The existence of a factual dispute does not end the inquiry. In summary judgment terms, the disputed fact must be material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In the context of a qualified immunity defense, the legal questions for the court to decide may well determine if the dispute is material. Here, the district court acknowledged that the plaintiff's argument raised "more troubling questions." The court also assumed, without deciding, that plaintiff had raised a genuine factual dispute as to whether defendants identified themselves as they approached St. Hilaire's vehicle. *St. Hilaire v. City of Laconia*, 885 F. Supp. 349, 357 n.2 (D.N.H. 1995).

The court nonetheless entered summary judgment for defendants, on the grounds that defendants did not violate any "clearly established" law. It reasoned that St. Hilaire's Fourth Amendment rights did not attach until the seizure actually occurred and that the shooting constituted the seizure. *Id.* at 357 n.3. It reasoned that the issue before it was whether there was a clearly established obligation under the Fourth Amendment for police not unreasonably to create circumstances where the use of deadly force becomes necessary and if so, whether any such obligation was "clearly established." *Id.* at 356-57. It said there was no such clearly established obligation.

The district court analysis was reasoned and grounded on law from other Circuits. *See id.* at 357-58 (citing *Drewitt v. Pratt*, 999 F.2d 774, 780 (4th Cir. 1993) (look only to whether it was reasonable for police officer to shoot in the circumstances as they existed at that moment); *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) ("we scrutinize only the seizure itself, not the events leading to the seizure"); *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992) ("[P]re-seizure conduct is not subject to Fourth Amendment scrutiny.")). We believe that reasoning to be in error

and to create some of the difficulties warned against in *Mitchell* and *Anderson*. We nonetheless affirm on the ground that the factual dispute as to whether the defendant officers identified themselves as they approached St. Hilaire is immaterial as a matter of law.

We first reject defendants' analysis that the police officers' actions need be examined for "reasonableness" under the Fourth Amendment only at the moment of the shooting. We believe that view is inconsistent with Supreme Court decisions and with the law of this Circuit. The Supreme Court in *Brower v. Inyo*, 489 U.S. 593 (1989), held that once it has been established that a seizure has occurred, the court should examine the actions of the government officials leading up to the seizure.[4] The Court held that petitioners decedent was "seized" when he crashed into a police roadblock set up in order to stop his flight. "We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result." *Id.* at 599. The Court remanded the cause for a determination of whether the seizure was "unreasonable" in light of petitioners' allegations that the roadblock had been set up

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4. The district court's citation of *California v. Hodari D.*, 499 U.S. 621 (1991), is inapposite. The question before the Supreme Court in *Hodari* was whether the defendant, who discarded cocaine while being pursued by police, had been "seized" at the time he dropped the drugs, for the purpose of determining whether the drugs were the fruit of an illegal seizure. *Id.* at 623. Thus, the question was not whether the seizure was *reasonable*, which requires an examination of the totality of the circumstances, but whether there had been a seizure at all. We do not read this case as forbidding courts from examining circumstances leading up to a seizure, *once it is established that there has been a seizure*. We understand *Hodari* to hold that the Fourth Amendment does not come into play *unless* there has been a seizure, not that it does not come into play *until* there has been a seizure.

in such a manner as to be likely to kill the decedent. *Id.; see also Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir.) ("[W]e carve up the incident into segments and judge each on its own terms to see if the officer was reasonable at each stage."), *cert. denied*, 115 S. Ct. 81 (1994).

This court has recently followed a similar approach. In *Hegarty*, this court examined each of the actions leading up to the mortal wounding of a woman whom police officers were attempting to arrest for recklessly endangering the safety of four campers. 53 F.3d 1367. Instead of focusing solely on whether the officer who shot Hegarty was acting in self-defense at the moment of the shooting (Hegarty had picked up a rifle and raised it in the direction of the officers and ignored their demands to drop it), the court examined all of the actions of the officers to determine whether there was probable cause to arrest Hegarty and whether there were exigent circumstances to allow a forcible, warrantless, nighttime entry into her dwelling. *Id.* at 1374-79. Similarly, in *Roy v. Lewiston*, this court examined all of the surrounding circumstances in determining whether the police acted reasonably: "Roy was armed; he apparently tried to kick and strike at the officers; he disobeyed repeated instructions to put down the weapons; and the officers had other reasons . . . for thinking him capable of assault." 42 F.3d at 695.

This focus on the moment of the shooting led the district court to conclude that the issue was whether there was any clearly established constitutional duty on the part of police to avoid creating situations which increased the risk of use of deadly force. The district court concluded there was no such generalized duty. *Cf. Carter v. Buscher*, 973 F.2d 1328, 1331-33 (7th Cir. 1992) (reading *Brower* to mean that courts should consider reasonableness of seizure in totality of circumstances,

but should not consider whether it was reasonable for the police to create the circumstances). But at the core of plaintiff's case is not the broad contention that the police have a duty to reduce the risk of violence. Such a contention itself creates a risk that the "duty" is so broadly defined that it gives inadequate notice of what would violate the duty and thus would fall back on whether those specific facts have occurred in the case law before. Plaintiff instead makes a narrower, more specific claim.

Plaintiff contends that in executing a search warrant, the Fourth Amendment's prohibition against "unreasonable searches" requires the police to identify themselves as police and state their purpose.[5] Plaintiff's theory is that if the police had properly identified themselves, St. Hilaire would have known they were police, would not have himself felt endangered when he saw a stranger approach with a gun in his hand, and that St. Hilaire would not have made a movement in the direction of his gun. It is that movement which led Detective Gunter to fire his own weapon. There is some additional support in the record for plaintiff's theory. St. Hilaire and the police had had prior dealings. In each, the police identified themselves and St. Hilaire did not threaten them.

It falls to the court to determine whether this right allegedly

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5. Plaintiff relies on *Tennessee v. Garner*, 471 U.S. 1 (1985), which held that the Fourth Amendment prohibits use of deadly force to prevent the escape of an apparently unarmed suspected felon unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. *Garner* indeed establishes that "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Id.* at 6. But *Garner*, while helpful, did not resolve immunity issues in that case, nor does it do so here.

violated was "clearly established" at the time of the incident. "Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law." *Elder,* 114 S. Ct. at 1022.

Plaintiff relies on the Supreme Court's recent decision in *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995), which held that the reasonableness of the search of a dwelling depended in part on whether law enforcement officers announced their presence and authority prior to entering, thus incorporating the common law "knock and announce" rule into the Fourth Amendment.

Assuming *arguendo* that the *Wilson* rule supports plaintiff's case,[6] plaintiff's argument succeeds only if *Wilson* merely restated what was already clearly established constitutional law at the time of the shooting in 1990. *See Davis v. Scherer*, 468 U.S. 183 (1984) (constitutional right to a pretermination or prompt post-termination hearing was not yet clearly established at time of discharge and it availed plaintiff not that defendant state officials violated state administrative regulations requiring such

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6. Fourth Amendment law in some contexts recognizes a distinction between a person's home and a person's car. For example, the Fourth Amendment permits a slightly broader search pursuant to the arrest of the occupant of a vehicle and some warrantless searches of vehicles are permitted even if there are not emergency circumstances. *See generally* 1 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 3.7 (1984). One explanation for the different protection of items found in vehicles is that "[o]ne has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. . . . It travels public thoroughfares where both its occupants and its contents are in plain view." *United States v. Chadwick*, 433 U.S. 1, 12 (1977) (quoting *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974)).

hearing because § 1983 protects constitutional rights); *Elder*, 114 S. Ct. at 1023 ("[T]he clearly established right [must] be [a] federal right."); *Harlow*, 457 U.S. at 818. Thus, in order for the plaintiff to prevail, the notice requirement must have been clearly rooted in the Fourth Amendment jurisprudence in 1990. Plaintiff's argument fails because at the time of the shooting the notice requirement was not clearly of constitutional dimension.

The Court in *Wilson* noted that it had "never squarely held that this [common law] principle [of announcement] is an element of the reasonableness inquiry under the Fourth Amendment." 115 S. Ct. at 1918. The Supreme Court granted certiorari in *Wilson* precisely in order to resolve a conflict among state courts as to whether the common-law notice requirement was a part of the reasonableness inquiry under the Fourth Amendment. *Id.* at 1916. The Court noted that in California and Illinois, it had been so held, but in Massachusetts, it had been held merely a rule of common law, not constitutionally compelled. *Id.* at 1916 n.1. The highest court in New Hampshire had held only that there was a common law rule that "police officers, before forcibly entering a dwelling, should knock, identify themselves and their purpose, and demand admittance." *State v. Jones*, 127 N.H. 515, 503 A.2d 802, 805 (1985). The court in *Jones* further held that this rule "ha[d] its basis in the common law" but did not foreclose the possibility that a failure to knock and announce may be so flagrant that a subsequent entry could violate the state constitution's prohibition against unreasonable searches and seizures. *Id.* at 805-06. The issue of whether the search at issue violated the federal constitution was not before the New Hampshire court. *Id.* at 805. *Cf. Prokey*, 942 F.2d at 72 n.5 (looking to Maine law definition of probable cause as to immunity question).

Appendix D

The First Circuit has not decided whether a search in violation of the "knock and announce" rule violated the Fourth Amendment, although it has considered alleged violations of the federal "knock and announce" statute applicable to federal officers, 18 U.S.C. § 3109. *See, e.g., United States v. One Parcel of Real Property,* 873 F.2d 7, 9 (1st Cir.), *cert. denied sub nom. Latraverse v. United States,* 493 U.S. 891 (1989); *United States v. DeLutis,* 722 F.2d 902, 908-09 (1st Cir. 1983). Thus, the established law at the time of the shooting was that the notice requirement was embodied in New Hampshire's common law. It was not, though, clearly established in this Circuit as a constitutional requirement until *Wilson*. In a § 1983 action, plaintiffs must show the *constitutional* right involved was clearly established. *Davis,* 468 U.S. at 194. Accordingly, under *Harlow* the defendants are entitled to qualified immunity on this theory.

As to the plaintiff's theory that there were disputed facts as to whether Detective Gunter had a reasonable belief he was acting in self-defense when he shot St. Hilaire, we, like the district court, see no such dispute. *See* 885 F. Supp. at 356-57. The judgment Detective Gunter made in that split second was at the very least reasonable, and it is not the role of the court to second-guess the decision. *See, e.g., Hegarty,* 53 F.3d at 1377; *see also Hunter,* 502 U.S. at 229; *Anderson,* 483 U.S. at 641.

The Search Warrant.

Whether or not there was probable cause for the warrant, defendants are entitled to qualified immunity unless "the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Malley v. Briggs,* 475 U.S. 335, 344-345 (1986).

Appendix D

The facts presented in the warrant application are not disputed. We are thus left with the question of whether defendants are entitled to qualified immunity as a matter of law. Fed. R. Civ. P. 56(c). Recognizing that the police may not obtain immunity by relying on the judgment of the judicial officer issuing the warrant under *Malley*, the deferdants argue that there were reasonable indicia of probable cause and their belief they had probable cause can not be called unreasonable. That is, indeed, what the undisputed record demonstrates. A confidential informant told Deputy Dupuis that St. Hilaire was selling cocaine from Laconia Auto Wrecking, which was owned and operated by St. Hilaire. Dupuis consulted with detectives at the Laconia and Belmont Police Departments who had worked with the confidential informant on prior occasions. These detectives told Dupuis that the informant had twice previously provided information that led to seizures of contraband and the arrests and convictions of several persons. The informant then met with Dupuis and Detective Gunter in order to make a controlled purchase at Laconia Auto Wrecking. The substance purchased tested positive for cocaine. A second controlled purchase was made; the substance obtained also tested positive for cocaine. The informant also told Dupuis that St. Hilaire was going to New York to "score" a load of cocaine. Airline records confirmed that St. Hilaire had made a reservation to fly to New York around the same time as the informant's report.

On these facts, we cannot say that the indicia of probable cause are so lacking as to render official belief in its existence unreasonable. *See Malley*, 475 U.S. at 344-45. Defendants are therefore entitled to qualified immunity with respect to plaintiffs claim for lack of probable cause to issue the warrant.

Appendix D

Municipal Defendants

The claims against the municipal defendants necessarily fail because we find there was no deprivation of St. Hilaire's clearly established rights and there was reasonable ground to believe the warrant supported by probable cause.

The judgment of the district court is affirmed. No costs are awarded.

APPENDIX E — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE FILED MARCH 31, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 93-191-B

Kathy St. Hilaire

v.

City of Laconia, et al.

MEMORANDUM AND ORDER

Laconia Police Department Detective David Gunter shot and killed Philip St. Hilaire while executing a search warrant. St. Hilaire's wife, Kathy, has sued Gunter, the other officers involved in executing the warrant, and their employers. She argues that the defendants violated her husband's Fourth Amendment rights because: the warrant authorizing the search was not supported by probable cause; defendants omitted material facts from the affidavit supporting the warrant application; and defendants unreasonably used deadly force in executing the warrant. She also alleges that defendants are liable under various state law theories. Defendants have responded with summary judgment motions contending that the individual defendants are protected from suit on her federal claims by the doctrine of qualified immunity. They also argue that plaintiff has failed to state a constitutional claim against the municipal defendants. Finally, defendants ask me to decline supplemental jurisdiction over plaintiff's state law claims.

Appendix E

I. *FACTS*

On April 27, 1990, Belknap County Deputy Sheriff Robert Dupuis applied for a warrant to search Philip St. Hilaire and his business, Laconia Auto Wrecking, for cocaine, drug paraphernalia, and materials related to drug trafficking. Dupuis provided an affidavit in support of the warrant application that included information from a confidential informant who allegedly told Dupuis that St. Hilaire was selling cocaine at Laconia Auto Wrecking. Dupuis further alleged in his affidavit that: the informant had purchased cocaine from Laconia Auto Wrecking on two occasions under police supervision within the last two weeks; Dupuis was able to partially corroborate the informant's claim that St. Hilaire was planning a trip to New York to purchase cocaine; and two of Dupuis' fellow officers had previously obtained reliable information from the informant. Based on this information, a special justice of the Laconia District Court issued the warrant the same day.

After Dupuis obtained the warrant, he and other law enforcement personnel, including defendants Gunter, David Nielsen and Brian Loanes of the Belmont Police Department, and Daniel Collis of the Belknap County Sheriff's Office, met at the sheriff's office to plan the searches. The group decided that Nielsen, Loanes, and Dupuis would form a team to find and search St. Hilaire. Nielsen volunteered to wear his uniform and the others agreed that they would remain in plain clothes. Collis and Gunter were assigned to surveillance across the street from Laconia Auto Wrecking. All of the defendants were warned that St. Hilaire was likely to be armed.

The defendants planned to search St. Hilaire while he was at work. Accordingly, the search team agreed to meet in the parking

lot of the nearby vocational-technical school and to walk through the woods to the rear of Laconia Auto Wrecking. They would then wait at the back corner of the building with Collis and Gunter watching the front to let them know if the building appeared to be open for business. They also planned to station patrolmen in marked cruisers on the road on either side of Laconia Auto Wrecking. If surveillance reported that the building appeared to be open, the search team would come to the front of the building, enter with Nielsen in uniform leading, and confront St. Hilaire inside the building. If the building was closed for business, they would either try to break in or wait for St. Hilaire to leave the building and apprehend him in the yard.

At first, all went according to plan. The cruisers and surveillance were in place. The search team assembled in the parking lot and then walked to the rear of the building. When they learned from surveillance that the building appeared to be locked, Dupuis called Gunter at his position in the parking lot across the street and instructed him to join the search team. While they were waiting for tools and making plans to break in, Collis radioed that St. Hilaire was leaving the building. The group then immediately ran to the front of the building and saw that St. Hilaire was sitting in the driver's seat of his car with his back to the approaching officers.

Instead of approaching St. Hilaire in a group with Nielsen in uniform leading as planned, the officers ran toward the car from behind, with their weapons drawn, in single file separated by ten to fifteen feet. Gunter, in plain clothes, was in the lead, followed by Dupuis, Nielsen, and Loanes. The officers contend that they shouted a series of orders to St. Hilaire with some variation in their accounts. Gunter states that he said "Phil, Phil, police" as he approached the rear of the car, and that he thought he may have

yelled, "Hold it" or "Police," when he arrived at the passenger door. Nielson reports that he heard Gunter yell, "Hold it Phil, police, hold it," as Gunter approached the passenger side of the car and that no one else said anything. Dupuis claims that he yelled, "Police," once or twice as he came around the corner of the building but stopped because other people were yelling. Loanes states that he did not shout anything, but he heard others say, "Police freeze," or "Phil, its the police," or "Freeze, its the police." Collis states that he heard yelling from one officer, he did not know who, including the word "Police." Finally, a motorist passing the building at the time reported that he heard a shout of "Freeze" just before seeing the flash of a gunshot.

Gunter ran to the passenger side of the car with his gun in his right hand. When Gunter reached the car, St. Hilaire turned and made eye contact with him. At the same time, Gunter saw St. Hilaire's right shoulder move and later claimed that he thought that St. Hilaire was reaching for his gun. Gunter then shot St. Hilaire through the partially open passenger window.

Nielsen opened the driver-side door and found St. Hilaire slumped in the seat with a critical throat wound. St. Hilaire's gun was found next to him on the seat of his car. Nielsen reports that St. Hilaire asked him, "Why didn't he identify himself, why didn't he say he was a cop," and others state that St. Hilaire repeated the same questions at the hospital. As a result of the gunshot wound, St. Hilaire was paralyzed from his neck down. He died from complications caused by his injuries approximately eighteen months after the shooting.

II. *STANDARD OF REVIEW*

Summary judgment is appropriate if, after reviewing the

facts in the light most favorable to the nonmoving party, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Woods v. Friction Materials. Inc.*, 30 F.3d 255, 259 (1st Cir. 1994). A "genuine" issue is one "that properly can be resolved only by a finder of fact because [it] may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 250 (1986); *accord Garside v. Osco Drug, Inc.*, 895 F.2d 46, 48 (1st Cir. 1990). A "material issue" is one that "might affect the outcome of the suit" under the applicable legal standard. *Anderson*, 477 U.S. at 248. The burden is upon the moving party to show the lack of a genuine, material factual issue. *Finn v. Consolidated Rail Corp.*, 782 F.2d 13, 15 (1st Cir. 1986). When a motion for summary judgment is properly supported, the burden shifts to the nonmovant to show that a genuine issue exists. *Donovan v. Agnew*, 712 F.2d 1509, 1516 (1st Cir. 1983). If the nonmovant fails to offer sufficient factual support to counter the movant's proffer on an element for which the nonmovant bears the burden of proof at trial, all other factual issues become immaterial, and the movant is entitled to summary judgment. *Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 12 (1st Cir. 1994), *petition for cert. filed*, (Feb. 21, 1995).

III. *DISCUSSION*

The primary issue presented by defendants' summary judgment motions is whether the individual defendants are entitled to qualified immunity with respect to plaintiff's constitutional claims. Thus, I begin by describing the law governing qualified immunity claims and then consider its application to plaintiff's specific claims that the individual

defendants violated St. Hilaire's Fourth Amendment rights. I then turn to defendants' challenges to plaintiff's remaining claims.

A. *Qualified Immunity for Constitutional Claims Against the Individual Defendants*

In *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982), the Supreme Court recognized that public officials performing discretionary functions are entitled to qualified immunity from suit for violations of federal law "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." A "necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley,* 500 U.S. 226, 232 (1991). Thus, a court may determine that a defendant is entitled to qualified immunity if either the plaintiff fails to properly assert and support a claim based on the violation of a constitutional right, or the court concludes that the law on which plaintiff's claim was based was not clearly established when the defendants acted. *Id., see also Febus-Rodriguez v. Betancourt-Lebron,* 14 F.3d 87, 91 (1st Cir. 1994) (holding that as a predicate to the qualified immunity inquiry, "a plaintiff must establish that a particular defendant violated the plaintiff's federally protected rights.").

The resolution of a qualified immunity defense presents a legal question for the court. *Elder v. Holloway,* 114 S.Ct. 1019, 1023 (1994); *Whiting v. Kirk,* 960 F.2d 248, 250 (1st Cir. 1992). Moreover, since the immunity is an immunity from suit rather than merely a defense to liability, it is imperative that such claims

be resolved at the earliest possible date after suit is commenced. *Siegert*, 500 U.S. at 232-33. Thus, I will determine defendants' entitlement to immunity on their motions for summary judgment unless factual disputes material to the issue require resolution by the jury before I can resolve the legal questions their motions present. *See Prokey v. Watkins*, 942 F.2d 67, 73 (1st Cir. 1991).

1. Probable Cause

Plaintiff first claims that she is entitled to damages because the defendants lacked probable cause to seize St. Hilaire. Probable cause to issue a warrant exists if the totality of the circumstances related in the affidavit, viewed with common-sense, presents a fair probability that the proposed search will find contraband or evidence of a crime. *United States v. Jordan*, 999 F.2d 11, 13 (1st Cir. 1993) (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). Under the totality of the circumstances test, the value of a confidential informant's information is evaluated in light of all the indicia of its reliability, and a deficiency in one area may be compensated by the strength of other relevant factors. *United States v. Diallo*, 29 F.3d 23, 25 (1st Cir. 1994) (citing *Gates*, 462 U.S. at 232-33).

The affidavit that Dupuis submitted in support of the search warrant application alleges that: (1) St. Hilaire owned Laconia Auto Wrecking; (2) an informant, whose established record of providing reliable information was detailed in the affidavit, reported that St. Hilaire was selling cocaine at his place of business; (3) the informant, acting under police supervision, subsequently purchased cocaine at St. Hilaire's business on two occasions in the weeks prior to the seizure; (4) the informant told the defendants that St. Hilaire was planning a trip to New York to purchase cocaine; and (5) airline records confirmed that St.

Hilaire had made a reservation around the same time as the informant's report on a flight to New York's LaGuardia Airport.

These allegations sufficiently demonstrate the informant's reliability and corroborate his claim that St. Hilaire was engaged in the business of selling cocaine to support the issuing judge's probable cause finding even though the affidavit does not expressly allege that the informant purchased cocaine directly from St. Hilaire. *See Gates*, 462 U.S. at 230; *see also Jordan*, 999 F.2d at 13-14. Accordingly, because plaintiffs have not shown that the search warrant lacked probable cause, defendants are entitled to immunity with respect to plaintiff's probable cause claim.

2. Material Omissions

Plaintiff next argues that St. Hilaire's seizure was unlawful because Dupuis failed to disclose in his affidavit that his informant was induced to provide information against St. Hilaire through offers of unspecified "consideration" with respect to several outstanding felony charges. The Supreme Court has recognized that a police officer's reckless or intentional misstatements of material fact in a search warrant affidavit violate the Fourth Amendment. *Franks v. Delaware*, 438 U.S. 154 (1978). This rule has been extended by various courts of appeal to include an affiant's intentional or reckless omission of material facts. *See United States v. Higgins*, 995 F.2d 1, 4 (1st Cir. 1993); *United States v. Knapp*, 1 F.3d 1026, 1029 (10th Cir. 1993); *United States v. Travis*, 993 F.2d 1316, 1320 (8th Cir.), *cert. denied*, 114 S. Ct. 229, 245 (1993). When plaintiff claims a Fourth Amendment violation based on alleged omissions of material facts from a warrant application, the merit of the claim depends on "'whether, even had the omitted statements been

included in the affidavit, there was still probable cause to issue the warrant.'" *Higgins*, 995 F.2d at 4 (quoting *United States v. Rumney*, 867 F.2d 714, 720-21 (1st Cir.), *cert. denied*, 491 U.S. 908 (1989)).

Even if Dupuis's affidavit had been corrected to include the "consideration" the police offered the informant, it still would have demonstrated probable cause to justify the search because the affidavit contained enough corroboration and sufficient evidence of the informant's past reliability to establish the probable accuracy of the informant's information. Thus, plaintiff has failed to properly support her material omissions claim, and therefore, defendants are entitled to immunity with respect to this claim.

3. Excessive Force

Plaintiff's final claim is that defendants used unconstitutionally excessive force in executing the warrant.

a. Fourth Amendment Reasonableness and Qualified Immunity

Excessive force claims arising during the course of a police search or seizure must be analyzed under the Fourth Amendment's reasonableness clause. *Graham v. Connor*, 490 U.S. 386, 395 (1989).[1] Precedent dictates that the reasonableness of searches and seizures must be evaluated by considering whether the officer's conduct was objectively reasonable when

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1. Plaintiff alleged in her complaint that defendants' use of deadly force also violated St. Hilaire's right to substantive due process. However, in light of *Graham*, plaintiff has abandoned this cause of action.

judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396. Moreover, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation." *Id.* at 397. Ultimately, the reasonableness of an officer's use of force will be determined by "careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396 (quotations omitted).

Because a determination of both liability for and immunity from claims based on violations of the Fourth Amendment's reasonableness clause require an inquiry into the objective reasonableness of a defendant's conduct, some courts in other circuits appear to suggest that the same test should be used to evaluate both the substantive claim and the immunity defense. *See Wardlaw v. Pickett*, 1 F.3d 1297, 1303 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 2672 (1994); *Hopkins v. Andaya*, 958 F.2d 881, 885 n.3 (9th Cir. 1992); *Jackson v. Hoylman*, 933 F.2d 401, 402-03 (6th Cir. 1991); *Street v. Parham*, 929 F.2d 537, 540-41 n.2 (10th Cir. 1991). Following a similar approach, the First Circuit in *Roy v. Inhabitants of Lewiston*, 42 F.3d 691 (1st Cir. 1994), held that the defendants were entitled to immunity from plaintiff's excessive force claim, but observed that because the substantive standard and the immunity standard in such cases turns on whether the officer's conduct was objectively reasonable, the outcome probably would have been the same even if the officers had not raised an immunity defense. *Id.* at 695.

While these cases might be read to suggest that a defendant in an excessive force case can never claim immunity if the plaintiff pleads and properly supports a claim that defendants unreasonably used excessive force, that interpretation is plainly inconsistent with Supreme Court precedent. In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Supreme Court held that a police officer is immune from suit for an alleged violation of the Fourth Amendment's reasonableness clause if his conduct was objectively reasonable when "assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Id.* at 639 (citation omitted). The dissent contended that the majority's formulation was incorrect because it would improperly entitle a defendant to immunity even if he reasonably, but mistakenly, concluded that his conduct was objectively reasonable. *Id.* at 648 (Stevens, J., dissenting) (contending that the majority improperly adopted "a double standard of reasonableness — the constitutional standard already embodied in the Fourth Amendment and an even more generous standard that protects any officer who reasonably could have believed that his conduct was constitutionally reasonable."). The majority countered by noting that in past applications of the doctrine of qualified immunity, the Court had afforded immunity protection to officers who had allegedly violated the Fourth Amendment. In addition, the majority explained that the confusion caused by using the terms "reasonable" and "unreasonable" to describe both immune conduct and Fourth Amendment violations did not preclude using a different "reasonable" standard for evaluating the immunity defense. *Id.* at 643.

Anderson thus requires that a court consider two factors in evaluating an immunity defense to a claim based upon the Fourth Amendment's reasonableness clause: (1) whether a constitutional violation occurred at all; and (2) " 'whether a

reasonable [officer] could have believed his actions were lawful in light of clearly established law and the information the official possessed at the time of his allegedly unlawful conduct.' " *Febus-Rodriguez*, 14 F.3d at 91 (quoting *McBride v. Taylor*, 924 F.2d 386, 389 (1st Cir. 1991)). *Accord Jones by Jones v. Webb*, 45 F.3d 178, 183 (7th Cir. 1995) (holding that qualified immunity defenses to excessive force claims must be analyzed by asking "whether a reasonable officer could have believed that his conduct was constitutional in light of the clearly established law and the information the officer possessed at the time the incident occurred." (quotations and citations omitted)). Accordingly, an officer is entitled to claim qualified immunity in a police misconduct case even if he acted unreasonably unless the law under which the officer's conduct is deemed unreasonable was clearly established when he acted.

b. Application

In *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), the Supreme Court stated that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *See also Reese v. Anderson*, 926 F.2d 494, 501 (5th Cir. 1991); *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir.), *cert. denied*, 112 S. Ct. 1954 (1992). Relying on this principle, defendants argue that they are entitled to qualified immunity because the undisputed facts establish that when Gunter shot St. Hilaire, he reasonably believed that St. Hilaire was about to use deadly force against him. Plaintiff offers two arguments to support her claim that defendants are not entitled to summary judgment on this issue. First, she argues that a genuine factual dispute exists as to whether Gunter reasonably needed to use deadly force against

St. Hilaire to protect himself. Second, she contends that even if Gunter acted in self-defense, defendants violated the Fourth Amendment by attempting to execute the warrant in a way that unreasonably increased the likelihood that they would have to use deadly force.

Plaintiff's first argument is easily addressed. While witnesses to the shooting disagree about minor details, no one disagrees that: (1) St. Hilaire was known to carry a weapon; (2) St. Hilaire's gun was found on the seat beside him after the shooting; and (3) the record contains no direct evidence to contradict Gunter's testimony that he shot St. Hilaire only after he reached for his weapon. Plaintiff's assertions that St. Hilaire lacked sufficient time to draw his weapon and that the position of his body when he was shot demonstrates that he could not have been reaching for his gun amount to little more than speculation. As such, they are insufficient by themselves to create a genuine dispute as to whether Gunter reasonably believed he had to use deadly force against St. Hilaire to defend himself.

Plaintiff's second argument raises more troubling questions. Although she points to several alleged deficiencies in the way in which defendants planned and executed St. Hilaire's seizure, plaintiff's most potent claim is that defendants unreasonably increased the likelihood that they would need to use deadly force by approaching St. Hilaire in plain clothes, with their guns drawn and without identifying themselves as police officers.[2] Had they properly identified themselves, plaintiff argues, St. Hilaire would have offered no resistance. Moreover,

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2. Defendants have produced substantial evidence to counter plaintiff's claim. However, I assume, without deciding, that plaintiff has produced enough factual support for her claim to raise a genuine factual dispute as to whether defendants identified themselves as police officers when they approached St. Hilaire's vehicle.

she contends that defendants' failure to identify themselves was unreasonable because they could easily and safely have done so without impairing their ability to subdue and search St. Hilaire.[3]

There is some support for the proposition that a police officer who resorts to deadly force in self defense violates the Fourth Amendment if he unreasonably creates the circumstances where the use of deadly force becomes necessary. *See, e.g., Estate of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1393) (if officer deliberately stepped in front of a moving vehicle, he may not invoke self defense as a defense to a damages claim for shooting the vehicle's driver); *Gilmere v. Atlanta*, 774 F.2d 1495, 1501 (11th Cir. 1985) (en banc) (officer cannot claim immunity from a deadly force claim by arguing self defense if the officer created the circumstances where it became necessary to use deadly force in self defense), *cert. denied*, 476 U.S. 1115, 1124 (1986). However, neither the Supreme Court nor the First Circuit Court of Appeals[4] has yet taken such a position, and there is substantial authority elsewhere to support the contrary proposition.

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3. It is well established that a person's Fourth Amendment rights are not implicated until a seizure actually occurs. *California v. Hodari D.*, 499 U.S. 621, 629 (1991); *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989). Accordingly, plaintiff does not contend that St. Hilaire's Fourth Amendment rights attached as soon as defendants drew their guns and approached his vehicle. Instead, she argues that St. Hilaire was "seized" when he was shot and, irrespective of whether Gunter was justified in using deadly force to defend himself at the moment of the shooting, the seizure violated St. Hilaire's Fourth Amendment rights because defendants' unreasonable conduct prior to the shooting increased the risk that one of them would have to use deadly force to subdue St. Hilaire.

4. Although the First Circuit held prior to *Graham* that police officers (Cont'd)

Appendix E

In dissenting from the denial of certiorari in one of the few cases supporting plaintiff's argument, then Chief Justice Burger stated that the court should have granted certiorari to reverse the decision because "an officer's conduct which makes the need for deadly force more likely does not constitutionally disable the officer from later using deadly force to defend himself." *Sampson v. Gilmere*, 476 U.S. 1124, 1125 (1986). Further, in *Drewitt v. Pratt*, 999 F.2d 774 (4th Cir. 1993), the Fourth Circuit Court of Appeals expressly rejected a claim that an officer who resorts to deadly force in self defense nevertheless violates the Fourth Amendment if he unreasonably provokes the shooting by failing to properly identify himself as a police officer. *Id.* at 778-789. Other circuits have reached similar conclusions. *See, e.g., Carter v. Buscher*, 973 F.2d 1328, 1332-33 (7th Cir. 1992); *Cole v. Bone*, 993 F.2d 1328, 1232-33 (8th Cir. 1993).

Given these conflicting precedents, the law concerning whether a police officer who legitimately uses deadly force in self-defense nevertheless violates the Fourth Amendment by unreasonably increasing the likelihood that deadly force will become necessary was not clearly established when the

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(Cont'd)
who use deadly force against people who pose *no danger* to the officers or others without first providing a warning violate the victims' rights to substantive due process, *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553 (1st Cir. 1989), Gunter's reasonable belief that St. Hilaire was about to shoot him distinguishes this case from *Gutierrez-Rodriguez*. Also, although the Supreme Court held in *Garner* that the Constitution requires police to provide a warning, *if feasible*, before using deadly force when a dangerous suspect flees or threatens them or others, *Garner*, 471 U.S. at 11-12, no warning was feasible in the split-second between when Gunter believed St. Hilaire was about to shoot him and he acted in self defense. Thus, neither *Gutierrez* nor *Garner* provide clearly established law applicable to the circumstances in this case.

defendants acted. *See Sullivan v. Horta*, 4 F.3d 2, 13 (1st Cir. 1993). Accordingly, the defendants are entitled to prevail on their qualified immunity defense.

B. *Municipal Defendants*

Plaintiff alleges that the Town of Belmont, the City of Laconia, and Belknap County are "jointly and severally liable" on her federal claims with the individual defendants. However, these claims allege solely a respondeat superior theory which is not cognizable under § 1983. *See Monell v. Department of Social Servs.*, 436 U.S. 658, 695 (1978); *Manarite v. Springfield*, 957 F.2d 953, 958 (1st Cir.), *cert. denied*, 113 S.Ct. 113 (1992). These claims are dismissed.

C. *Pendent State Claims*

Having dismissed plaintiff's federal claims, I decline to retain supplemental jurisdiction over her remaining state law claims. *See* 28 U.S.C.A. § 1367(c)(3). Accordingly, I dismiss these claims without prejudice.

IV. *CONCLUSION*

For the foregoing reasons defendants' motions for summary judgment (documents 16 and 19) are granted as to all of plaintiff's federal claims. Plaintiff's state law claims are dismissed without prejudice.

SO ORDERED.

s/ Paul Barbadoro
Paul Barbadoro
United States District Judge

Appendix E

March 31, 1995
cc: Donald Perreault, Esq.
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